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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WILLIAM CODY KELLY, Trustee,
Petitioner,
vs.
THE STATE OF CALIFORNIA,
THE STATE OF NEVADA,
TAHOE REGIONAL PLANNING AGENCY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Though the petition centers on the manifest intellectual chaos that is the lower courts' interpretation of *Penn Central*, 438 U.S. 104, 130 (1978), that " 'taking' jurisprudence does not divide a single parcel into discrete segments" (see Petition, pp. 16-18), Respondent (TRPA) fails to mention the subject until p. 22 of its 30-page brief. Even then it does not address the legal issue,[1] but argues instead that Mr. Kelly should be "content" that TRPA deigned to take only a part of his land. Kelly is affluent — goes TRPA's argument (Br. Opp. p. 23) — and that makes him fair game.

Whatever that argument may be, constitutional law it isn't. Yet its submission provides an acute insight into the brazen result-orientation that characterizes Takings Clause litigation, and illustrates why legal doctrine in this field, as shaped by the lower courts, is such a widely conceded intellectual muddle.

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[1] TRPA's entire "argument" on this point may be found in one footnote at Br. Opp. p. 27, n.28, and is largely limited to quibbling with three Claims Court cases. In spite of the Nevada Supreme Court's reliance on the conflict-generating *Penn Central* quotation, TRPA casually tries to sidestep the issue (Br. Opp. p. 25) and does not even begin to address the legal chaos prevailing among state courts and federal Circuit Courts, outlined at Pet. pp. 16-18.

I

AMAZINGLY, TRPA CONFESSES THAT ITS VAUNTED ENVIRONMENTAL REGULATIONS ARE SUBJECT TO BEING BOUGHT

Though TRPA depicts itself as the defender of an "environmentally fragile enclave" (Br. Opp. p. 1), trying to protect "six sensitive lots" (*Id.*) one is startled to learn that all this nobility is concededly for sale. At Brief in Opposition p. 16, n.18, TRPA discloses that Mr. Kelly would be permitted to develop those "sensitive" lots if he pays it money. Is this some sort of permissible "exaction" that even pretends to comply with the strictures of *Nollan v. California Coastal Comm'n.*, 438 U.S. 825 (1987)? Not so that one can discern. It was not advanced as such below, nor here.

TRPA thus presents itself as a crusader for environmental purity, a thin green line defending the clarity of Lake Tahoe and the integrity of its surroundings — but simultaneously concedes that it can be bought. Kelly was eligible to buy IPES points — says TRPA — and had he done so, he could have built on his lots. (Br. Opp. p. 16, n.18). TRPA's concession brings this case within the ambit of issues already before the court in *Dolan v. Tigard*, No. 93-518 (*cert. granted* Nov. 29, 1993), and thus raises a certiorari worthy issue: Does a land regulation system which forbids development of assertedly "sensitive" land but waives the prohibition upon payment of money, pass constitutional muster?

TRPA's position was aptly characterized by Justice Scalia in *Nollan*, 438 U.S. at 837, as the equivalent of a government selling licenses to shout "fire!" in a crowded theater. TRPA now concedes that it merely offers

land-use indulgences for sale. Its own arguments de facto concede its position here to be "an out-and-out plan of extortion," to borrow another *Nollan* expression (*Id.*), not genuine environmental regulation.

II

TRPA's NOTION OF COMPENSABILITY OF PARTIAL TAKINGS IS AT ODDS WITH A CENTURY OF THIS COURT'S DECISIONS AND, HAS CAUSED CONFLICT AND CONFUSION IN THE LOWER COURTS

TRPA presents two dubious substantive propositions purporting to address the taking issue.[2] **First,** that where privately owned land is aesthetically pleasing, it is subject to regulatory confiscation,[3] and **second**, that

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[2] The *ad hominem* attack mode is central to TRPA's Opposition. For example, at Br. Opp. p. 21 n.22, TRPA asserts: "Kelly seriously misunderstands or miscasts IPES when he asserts: [N]o new subdivision lots had been approved under IPES since 1982." But even a perfunctory reading of the Petition and record demonstrates that this is the language of the Nevada District Court. (App. B79) This example is representative; the Opposition is replete with petty gamesmanship, apparently intended to divert the focus of this Court from the significant legal issues the Petition squarely presents, even though the operative core facts are not disputed, and even though the trial court found on those facts that improvement of Mr. Kelly's lots poses no threat to Lake Tahoe (App. D24).

[3] Though case law gives no indication that anyone has had the temerity to make this argument before this Court, it was pressed on the courts of Arizona and Texas, both of which rejected it. *See City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978), (private property cannot be confiscated by use-preventing regulation just

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regulatory confiscation of private property is permissible as long as the government deigns to leave the victimized citizen some residue of his holding.

Put another way, the "doctrine" on which TRPA's argument rests, is that there is no such thing as a partial regulatory taking — only total confiscation is actionable, says TRPA. But as shown in the Petition for Certiorari (pp. 11-15) such a notion would make hash out of almost a century of this Court's takings jurisprudence.[4] *See particularly United States v. Causby*, 328 U.S. 256, 261-262 (1946), quoted at Pet. p. 13, and *United States v. Grizzard*, 219 U.S. 180, 184-185 (1911) (in partial inverse takings compensation is payable, the same as in total ones). *Also see Delaware, Lackawanna & Western R. v. Morristown*, 276 U.S. 182, 193 (1928) (partial taking effected by an ordinance depriving railroad of authority to decide which taxicabs may serve its passengers on a segment of its land).

(fn. continued)
because it is pretty), and *Corrigan v. City of Scottsdale*, 720 P.2d 528, 536 (Ariz. App. 1985) (public interest in aesthetics too vague a justification for denial of use of substantial part of private land).

[4] If TRPA's argument were valid, why would the government ever condemn scenic easements, when it could readily acquire them by legislative fiat without paying a penny? After all, scenic easements, as well as wilderness and habitat preservation areas — to name some obvious examples — require only that the landowners be prevented from using their land. Thus, under TRPA's "reasoning" a government agency would be foolish to obey the law and acquire such easements by purchase or condemnation, when it could simply promulgate regulations that stultify use of portions of private land and achieve the same result gratis.

III

THE PREVALENCE OF CONFLICT AMONG THE LOWER COURTS' INTERPRETATIONS OF *PENN CENTRAL* IS UNCONTESTED BY RESPONDENT. IT CRIES OUT FOR CORRECTIVE ACTION BY THIS COURT

The survey of widely (and wildly) conflicting decisional law interpreting *Penn Central*, (Pet. pp. 16-18) stands unchallenged. This is so for the best of reasons: no rational person can honestly assert that the law on this point as it has developed in the lower courts, is anything but an intellectual Tower of Babel, with supposed legal signposts pointing simultaneously in all directions. A litigant — whether a constitutionally aggrieved citizen, or a governmental entity engaging in land-use regulation — should be able to ascertain how the "law" guides its actions. As things stand now that cannot be rationally done. American citizens are now de facto governed by a Constitution whose meaning varies widely from state to state.

IV

THE TAKINGS CLAUSE PROTECTS ALL CITIZENS. RESPONDENT'S ILLEGITIMATE SUGGESTION THAT THOSE MOST IN NEED OF ITS PROTECTION ARE LEAST ENTITLED TO IT WARRANTS UNEQUIVOCAL REJECTION

Neither is there merit to TRPA's position — interwoven throughout the Brief in Opposition (see, *e.g.*, p. 23) — that where the confiscated property is valuable or the victim of confiscation is affluent, its partial confiscation is perfectly all right.[5] Thus, argues TRPA, Mr. Kelly bought his property in 1966 for $500,000 and sold some of it for more, and that somehow makes him fair game for TRPA's acts of confiscation of a half dozen of his lots.[6]

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[5] TRPA's assumed notion that the government can just take from a citizen of means, is not only ideology masquerading as law, but it is self-stultifying. Poor people do not own much property worthy of confiscation nor do they own tracts of land coveted by preservationists. The "just compensation" guarantee extends not only to cases where the taking is cheap; indeed the need for compensation is greatest where the loss is greatest. *Klopping v. City of Whittier*, 8 Cal.3d 39, 43, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972), citing 56 Iowa L. Rev. 293, 307. Thus, whether TRPA likes it or not, the Takings Clause inherently protects the property owning class of citizens, and to deny them its protection destroys its central purpose.

[6] TRPA seeks refuge in an argument about "reasonable expectations." (Br. Opp. p. 23). But the trial court decision below did not go off on that basis. At the outset of its opinion the trial court made clear that "not too much attention is given to testimony of involving Mr. Kelly's investment decisions and expectations." (App B10).

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One problem with that argument is that it does violence to the basic arithmetic of inflation. When the $500,000 in 1966 dollars is translated into 1993 dollars, it becomes $2,400,000, without even considering the manifest fact that a prudent person possessing a half-million dollars in 1966 would invest it reasonably and garner a value in excess of inflation. That is what reasonable, investment-backed expectations are all about.[7]

A seven-figure confiscation from a single individual goes too far. It is an intolerable invasion of the rights secured by the Takings Clause.[8] *A fortiori*, the

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(fn. continued)

In any event, it should be quite unremarkable to say that when an American citizen buys land, he or she has every reasonable expectation that the government cannot take it — or any substantial part of it — without paying the just compensation guaranteed by the Fifth Amendment.

[7] It requires neither an erudite economist (nor indeed the proverbial rocket scientist) to realize that in inflationary times, land is a well-nigh perfect investment. And so it was here. Yet, under TRPA's reasoning, the reasonable and prudent act of making such an investment would render the owner vulnerable to the simplistic argument that having bought the land for uninflated dollars, he or she can now be freely deprived of a substantial part of it, supposedly because what land is left to the owner is now worth more inflated dollars.

[8] Mr. Kelly urges in the strongest terms that if nothing else, certiorari be granted to consider the important issue of whether a state court can simply ignore current market value of the confiscated property interest, and pretend instead — as did the Nevada Supreme Court — that the historical cost expressed in preinflationary 1966 dollars can be used interchangeably with 1993 dollars, thus impermissibly disguising the loss inflicted on the citizen.

When lawfully taking property by eminent domain, the government may not pay yesterday's prices with today's eroded dollars (*see Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 17 (1984).

(continued)

"reasoning" underlying TRPA's argument on this point inexorably suggests that those who acquired valuable property a long time ago (to say nothing of donees, legatees and holders of future interests) are constitutional nonpersons whose substance is fair game for the government that is supposed to protect them. With all due respect, that does not resemble any respectable constitutional doctrine. The very purpose of the Taking Clause is precisely to guard against this sort of dumping of a disproportionate share of public benefit onto randomly chosen individuals. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). See, *ante*, n.5.

In its repeated assertions that the unbuilt lots retain value, TRPA does not come to grips with the obvious fact that *all* land — however harshly regulated — retains some value, if only to hard boiled speculators. But such "value" is not the market value the Constitution contemplates.

V

RESPONDENT DE FACTO CONCEDES THE PREEMPTION ISSUE

The Brief in Opposition (pp. 28-30) contains not one word in defense of the erroneous ruling below that simply ignored manifest Congressional intent on the preemptive sweep of the compact.

The population of two states has been subjected to what is now all but explicitly conceded to be an erroneous interpretation of law that impairs state

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(fn. continued)
A fortiori, it should not be able to do so when it violates the Constitution.

constitutional rights. But according to TRPA it's no big deal. Why not? Because, says TRPA, had the Nevada courts eschewed this manifest legal error, they would have reached the same conclusion. Perhaps so, and perhaps not, but shouldn't those courts at least have an opportunity to consider this issue? In the meantime, it's too bad for the citizens of Nevada [and California] who have seen their state constitutional rights wiped out by an erroneous interpretation of the compact that is contrary to Congress' express intent. (See Pet. pp. 26-28).

Not in spite of, but because of Respondent's argument on this point, a grant of certiorari is called for.

CONCLUSION

In his Petition, Mr. Kelly presented significant and recurring constitutional issues. After TRPA's obfuscatory response, they remain significant and squarely presented.

The trial court found that "[i]t is difficult . . . if not absurd, to avoid calling the effect of TRPA's code of ordinances on the Uppaway hilltop anything other than a temporary taking for a public purpose." (App. B84). And so it is. This essentially factual determination lies at the heart of this case.[9] There *was* a taking here.

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[9] A close parallel may be found in *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), where the trial court likewise found on the facts that the zoning ordinance was confiscatory — a factual finding whose inescapable constitutional consequence could not be avoided by the Massachusetts Supreme Court whose contrary ruling this Court reversed.

In too many jurisdictions, citizens whose land is partially taken by eminent domain routinely receive compensation for partial takings, while their neighbors whose land is partially taken by lawless confiscatory regulations do not. Yet both are said to benefit from the same "just compensation" guarantee of the Fifth Amendment. The judicial response to this important constitutional issue varies from state to state, from Circuit to Circuit, or even from court to court. And yet, all those judicial voices contributing to this intellectual cacophony claim to be singing the one true constitutional tune. Corrective action by this Court is overdue.

Mr. Kelly prays that certiorari issue.

DATED: December 9, 1993.

Respectfully submitted,

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